

***Partes secanto***  
**Aulus Gellius and the Glossators**

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*1. Introduction*

Recently, Edith Friedler asserted anew what the nineteenth-century writer Karl Simrock (1802-1876) once said: namely, that the principal theme of Shakespeare's *The Merchant of Venice* derives from the XII Tables<sup>1</sup>. In this play, Shylock, a Venetian merchant, is willing to lend 3000 ducats (an enormous sum) without interest, but he demands in return: "Go with me to a notary, seal me there your single bond, and, in a merry sport, if you repay me not ... let the forfeit be nominated for an equal pound of your fair flesh, to be cut off and taken in what part of your body pleases me<sup>2</sup>". Here, Friedler argues, "Shakespeare once more draws from a legal system so foreign of his own and yet so eminently suitable to the purpose of his story. The question is, of course, whether penalty clauses were enforceable in civil law ... the notion of a pound of flesh to satisfy a debt [being] found in the old Roman law, specifically in the Law of the XII Tables<sup>3</sup>". A similar line of thought can be found in William Farina's *De Vere as Shakespeare*: "Today a contractual penalty clause authorizing death or disfigurement would be illegal; during Shakespeare's time however,

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<sup>1</sup> Cf. T.ECHTERMEYER, L.HENSCHER & K. SIMROCK, *Quellen des Shakespeare in Novellen, Märchen und Sagen*, III, Berlin 1831, p.194; E.Z.FRIEDLER, *Shakespeare's Contribution to the Teaching of Comparative Law*, Louisiana Law Review 60 (1999-2000), pp.1091ff.

<sup>2</sup> *The Merchant of Venice*, 1.3.43-50 quoted from D.BEVINGTON (ed.), *Complete Works*, New York 2004.

<sup>3</sup> FRIEDLER (*supra* n. 1), p.1091.

not necessarily. Such provisions were expressly allowed by Roman law, and these were, in turn, transmitted by the Code of Justinian to the city states of northern Italy. It was only thanks to the development of modern English civil law that such harshness was eventually mitigated<sup>4</sup>.

It has been argued before that “at one level the play is about the enforcement of a contract that contains a penalty clause<sup>5</sup>”. That is, however, incorrect. As William Scott has pointed out<sup>6</sup>, what Antonio signed is not a penalty clause attached to another contract, but rather a unilateral pledge (in the form of a deed) to pay a forfeit of his flesh unless he releases himself of his bond by returning the 3000 ducats. In England, apart from the appalling penalty, such conditional penal bonds<sup>7</sup> were commonplace— even though they function “in what seems to us to be a peculiarly topsy-turvy way<sup>8</sup>”. In England, procedural quirks made it difficult to collect on an action of debt on a loan agreement itself, hence creditors demanded that debtors sign a promise to pay the forfeit. A condition or defeasance would then state that the bond would be voided, if certain conditions were met, *viz.* repayment of the loan within the time<sup>9</sup>.

The forfeit of one’s flesh is a common theme in European medieval folklore<sup>10</sup>, blending in perfectly with the Germanic custom

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<sup>4</sup> W.FARINA, *De Vere as Shakespeare, An Oxfordian reading of the canon*, Jefferson 2006, p.62.

<sup>5</sup> Cf. R.A.POSNER, *Law and literature: A relation reargued*, Virginia Law Review 72 (1986), p.1357. The same line of thought can still be found in: G.MACKENZIE, *Shakespeare and the law*, a paper presented at the sixth colloquium of the Law Society of Upper Canada, March 10, 2006, published electronically at [www.lusc.om.ca/media/sith\\_colloquium\\_mackenzie.pdf](http://www.lusc.om.ca/media/sith_colloquium_mackenzie.pdf).

<sup>6</sup> Cf. W.O.SCOTT, *Conditional Bonds, Forfeitures and Vows in The Merchant of Venice*, English Literary Renaissance 34 (2004), p.286.

<sup>7</sup> Cf. B.J.SOKOL & M.SOKOL, *Shakespeare’s Legal Language: a Dictionary*, London 2000, pp.36ff. (s.v. bond).

<sup>8</sup> A.W.B.SIMPSON, *The History of the Common Law of Contract*, Oxford 1975, p.112.

<sup>9</sup> Cf. SCOTT (*supra* n.6), pp.288-289; J.H.BAKER, *An Introduction to English Legal History*, London 1990, p.366 and 387; S.J.STOLJAR, *A History of Contract at Common Law*, Canberra 1975, p.9.

<sup>10</sup> Cf. E.SCHAMSCHULA, *Das Fleischpfand Mot. J 1161.2 in Volkserzählung und Literatur*, Fabula 25 (1984), pp.277-295; U.DIEDICHSEN, *Das Fleischpfand, in: Literatur und Recht. Literarische Rechtsfälle von der Antike bis in die Gegenwart*, Göttingen 1996, pp.142-145; T. WOLPERS, *The Merchant of Venice, ibidem*, pp.151-153.

of outlawing judgement debtors who did not comply with the court's sentence. Such debtors became *remotus a fide*, which implied that they could be harmed or injured with impunity. The oldest Lombardic city-statutes did not restrict this Germanic custom, but by mid-thirteenth century many cities, Bologna among them, only allowed their apprehension and transfer to the city's debt prison, should they attempt to re-enter the city<sup>11</sup>. It can be argued that the latter is in accordance with Roman law, since it derives from the Justinian Code (C.7.71.1), that judgement debtors are incarcerated, unless they have paid the sum due or ceded all their goods.

The archaic provision of the XII Tables (ca. 450 B.C.) authorizing the creditors to lacerate the debtor's body if a loan is not repaid, is not transmitted into the Justinian Code or mentioned in any part of the Corpus Iuris. Our knowledge of such regulation stems from literary sources<sup>12</sup>; not from the legal texts, with which the glossators were acquainted. However, as will be shown below, the glossator Azo († 1230), one of Accursius' teachers, seems to have known the relevant passage from Aulus Gellius' work. It is through him that a reference to the XII Tables entered into the Ordinary Gloss.

It is well known, that since Renaissance times, many scholars refuse to believe Aulus Gellius<sup>13</sup>' account of the regulation in the XII Tables, which according to Max Radin "is not merely cruel, but becomes grotesque, when we note the provision that the dissecting creditors are not to be held too strictly to the due ratio of their conflicting claims<sup>14</sup>". For the glossators, however, execution on the person may per been less inconceivable.

## 2. XII Tables 3.6

In his *Noctes Atticae*, book 20, chapter 1, the Roman writer Aulus Gellius (ca 130 – 170 AD) represents the jurist, Sextus Caecilius

<sup>11</sup> For a detailed discussion see: H.PLANITZ, *Der Schuldbann in Italien*, ZRG Germ. Abt. 52 (1932), pp.134-259.

<sup>12</sup> Cf. Gel. *Noct.Att.* 20.1.50; Tertul., *Apol.* 4.9: *Sed et iudicatos retro in partes secari a creditoribus leges erant*; Quint. *Inst. orat.* III.6.84: *debitoris corpus inter creditores dividi licuit*; in Greek: Cass. Dio. Fr. 17.8 (ed. FIRA I, p.34).

<sup>13</sup> See for his life and date: L.HOLWORD-STREVENSON, *Aulus Gellius. An Antonine scholar and his achievement*, Oxford 2003, pp.11-47.

<sup>14</sup> Cf. M.RADIN, *Secare partis. The early Roman law of execution against a debtor*, American Journal of Philology 43 (1922), pp.32-48, at p.32

Africanus and the philosopher Favorinus from Arles (Arelate)<sup>15</sup> discussing the matter. Caecilius gives the substance and the phrasing of one of the provisions in the XII Tables (XII Tables 3.6) regulating the execution on the person in ancient Rome. First, a time of grace of 30 days was given to pay the amount of the judgement or arrange for it to be paid. Failing this, judgement debtors could be apprehended and brought before the praetor, who adjudged them to their creditor. This adjudication (*addictio*) did not yet imply enslavement or *Schuld knechtschaft*<sup>16</sup>. Debtors were deprived of their freedom to the effect that they were confined by the creditor in his own house for a period of 60 days, fastened with chains or foot irons of at least 15 pound<sup>17</sup>. “During that time on three successive market-days”, Aulus Gellius relates, “they were brought before the praetor<sup>18</sup> and the amount of the judgment against them was announced. On the third market-day, they were capitally condemned or sent across the Tiber to be sold abroad. But they made this capital punishment horrible by a show of cruelty and fearful by unusual terrors, for the sake, as I have said, of making faith [to one’s word] sacred. For, if there were several to whom the debtor had been adjudged, the laws allowed them to cut the man who had been made over to them in pieces, if they wished and share his body. And indeed I will quote the very words of the law, lest happily you should think I shrink for the odium: *Tertiis nudinis partis secanto: si plus minusve secuerunt, se fraudo esto*<sup>19</sup>”.

Did the XII Tables really allow creditors to lacerate the judgment-debtor? Most modern authors hold that Gellius’ account is correct, though they do not always make it clear whether the debtor is first killed and subsequently divided, or cut while still alive<sup>20</sup>. Joseph

<sup>15</sup> On Favorinus see: HOLWORD-STREVENSON (*supra* n.13), pp.98-130.

<sup>16</sup> According to some authors this was brought about by a *lex Poetelia Papiria* (ca 325 B.C.) after which time debt slavery seems to have been reduced to debt bondage, with the possibility to work off one’s debt. On the development in pre-classical Roman law see L.PEPPE, *Studi sull’ecuzione personale*, I, Milan 1981. This paper discusses the XII Tables only – and the glossators’ notion thereof.

<sup>17</sup> Cf. D.FLACH, *Die Gesetze der frühen römischen Republik, Text und Kommentar*, Darmstadt 1994, pp.124ff; KASER/HACKL, *Das römische Zivilprozessrecht*, München 1996, pp.142ff.

<sup>18</sup> The *praeco* or town crier according to FLACH (*supra* n.17), p.125.

<sup>19</sup> Gel. Noct. Att. 20.1.47-50 quoted from *The Attic Nights of Aulus Gellius with a translation* by J.C. Rolfe, III, London 1927; repr. London 1961, p.425.

<sup>20</sup> Cf. the literature cited by FLACH (*supra* n.17), p.126 note 95.

Kohler (1849-1919) taught the latter: “Die Gläubiger können ihm Stücken Fleisch vom Körper abschneiden so viel sie wollen, mehr oder wenig, oder ihm als Sklave verkaufen<sup>21</sup>”. Max Kaser (1906-1997) said *partes secanto* should be understood as “eine Teilung des Leichnams”, a division of the debtor’s body after he is killed<sup>22</sup>. Geoffrey MacCormack suggests this only applied if the judgement-debtor had died by natural causes during his confinement<sup>23</sup>.

Since Renaissance times, however, it has been proposed that *partis secanto* in the XII Tables had quite another meaning than Gellius reported. The French jurist Anne Robert (Annaeus Robertus † 1613) defended the view that a division of the debtor’s property was meant<sup>24</sup>. This was also the view of Otto Lenel (1849-1935) and was suggested anew by Vandick Londres da Nobriega in 1959 and by Otto Behrends in 1974<sup>25</sup>. Max Radin (1880-1950) proposed as translation: “let the public *sectores* retail the separate parts” of his property forfeited to the state<sup>26</sup>”. This interpretation too, proposed in 1922, had already been suggested in Renaissance times, *viz.* by John Taylor in 1742 – but since then forgotten<sup>27</sup>.

A third interpretation can already be found in the works of the 18<sup>th</sup>-century Dutch jurist and member of the High Court of Holland and Zeeland Cornelis Bijnckershoek (1673-1743). In his opinion the creditors neither divided the debtor’s body, nor his property among them. The XII Tables ruled, he said, that where a debtor was adjudged to more than one creditor, he should be sold at a public auction and

<sup>21</sup> J.KOHLER, *Shakespeare vor dem Forum der Jurisprudenz*, Berlin 1919; repr. Aalen 1980, p.11; cf. also PEPPE (*supra* n.16), p.135.

<sup>22</sup> Cf. M.KASER, *Das römische Zivilprozessrecht*, Munich 1966, p.102.

<sup>23</sup> Cf. G.MACCORMACK, *Partes secanto*, TvR 36 (1968), pp.509-518 at 516.

<sup>24</sup> Cf. ANNAEUS ROBERTUS, *Rerum iudicatarum libros IIII*, II.6 (ed. Geneva 1620, p.367): *convenientius fuerit haec verba legis xii. Tabularum partes secanto non ad corporis, sed ad bonorum sectionem referre*. Cf. also JOSEPHUS JUSTUS SCALIGER, *Scaligerana ou bon mots* (ed. Cologne 1667, p.216): “c’est vendre le bien d’un homme condamné”.

<sup>25</sup> Cf. O.LENEL, [Bookreview], ZRG Rom. Abt. 26 (1905), pp.499-524 at 508; V.LONDRES DE NÓBREGA, *Partes secanto*, ZRG Rom. Abt. 76 (1959), pp.499-50; O.BEHREND, *Der Zwölftafelgesetz*, Göttingen 1974, p.416.

<sup>26</sup> Cf. RADIN (*supra* n.14), p.47.

<sup>27</sup> Cf. his *Commentarius ad legem decemviralem de inope debitoris in partis dissecando*, in: D.FELLENBERG (ed.), *Jurisprudentia Antiqua*, Bern 1760, I, pp.565-600, at 599.

the proceeds divided among them<sup>28</sup>. The same has recently been argued – alas, without reference to Bynkershoek – by the German ancient historian Dieter Flach: “Nicht von seiner Leiche oder seinen Hab und Gut sollten sie Stücke abscheiden, sondern von der Rohkopferklumpen, die sie aus seinem Verkauf erlöst haben<sup>29</sup>”. Karl Hackl adopted this view in his revision of Kaser’s *Römisches Zivilprozessrecht*<sup>30</sup>.

### 3. *The Glossators*

Aulus Gellius’ account of the rules of the XII Tables was also known to the glossators. The earliest reference found is by Azo († 1230), who said in his summa of title C.7.71 on the *cessio bonorum*:

[...] *post xl. dies detur creditoribus dilacerandus sicut refert Aulus Gellius contineri in xii. tabularum, cuius duritiam Sextus Cecilius contra quemdam philosophum mirabiliter defendit*<sup>31</sup>.

Several twelfth and thirteenth-century manuscripts of the *Attic nights* have survived and part of its contents handed down in the medieval florilegia<sup>32</sup>. Azo must have been acquainted with one of them, for in his summa *Codicis* he summarises the passage in the *Attic nights* which describes the execution on the person in ancient Rome as follows: After 40 days – Azo and after him all glossators spoke of 40 instead of 60 days – the debtor is given to his creditors to be lacerated. Subsequently, Azo referred to the next passage in the *Attic nights* representing the later discussion among the jurist Sextus Caecilius (Africanus) and the philosopher (Favorinus from Arles). Cecilius argued that the very atrocity of this procedure proves that it was never meant to be taken seriously. He has never heard or read of any debtor being so dealt with.

<sup>28</sup> Cf. CORNELIS BIJNKERSHOEK, *Observationes iuris Romani*, I.1 (ed. Leiden 1752, p.10): *hoc est illum vendi et pretium invicem dividi*. Radin (*supra* n.14), p.34, mistakenly reports that according to Bijnckershoek the creditors divide the debtor’s property.

<sup>29</sup> Cf. FLACH (*supra* n.17), p.126.

<sup>30</sup> Cf. KASER/HACKL (*supra* n.17), p.144.

<sup>31</sup> AZO, summa C.7.71 (ed. Pavia 1506, repr. Turin 1966, p.292b).

<sup>32</sup> Cf. HOLFORD-STREVENIS (*supra* n.13), pp.333-336.

The phrasing of the Ordinary Gloss to C.7.71.1 almost literally follows the words of Azo, relating that according to Aulus Gellius, the XII Tables contained a provision allowing the debtor to be lacerated after 40 days of confinement<sup>33</sup>. The debtor could avoid such treatment through a *cessio bonorum*.

Jacques de Revigny, whose surviving lectures were given between 1260 and 1280 in Orleans, discussed the content of this gloss in his lecture on C.7.71.1. He rejected the view of Accursius, arguing that the XII Tables never contained a provision allowing creditors to lacerate the debtor's body, and in his view this is what Caecilius had said<sup>34</sup>.

This divergent view was not new. The same interpretation of the discussion between Caecilius and Favorinus can already be found in the report (written around 1220 by Alexander de Santo Aegidio) of Azo's lecture on C.7.71.1. Apparently, in his lecture, Azo taught that according to Sextus Caecilius the XII Tables contained a provision that the debtor should *not* be turned over to his creditors to be cut in pieces. Some philosopher – apparently Favorinus is meant – had said '*ex subtilitate sua*' that a debtor must be turned over to his creditors to be lacerated, if his debts are not paid in full. For the person is obligated, hence he can be lacerated: *Persona enim obligatur et ideo poterat dilacerari*<sup>35</sup>.

#### 4. The Context

The glossators referred to the regulation of the XII Tables and Aulus Gellius' account thereof in their commentaries to the title on the *cessio bonorum* in the Justinian Code. They read in the first constitution of this title that a *cessio bonorum* did not free judgement debtors from their obligation unless the proceeds sufficed to satisfy

<sup>33</sup> Gloss *In eo tantum* ad C.7.71.1. ... *Item in eo [prodest] quod post xl. dies non dabitur dilacerandus creditoribus, ut dicebat Aulus Gellius contineri in legem xii. tabularum, quam duritiam Sextus Cecilius contra quemdam philosophum defendit. pro qua infra eod. l. penult. (C.7.71.7).*

<sup>34</sup> JACQUES DE RÉVIGNY, *Lectura super C.7.71.1* (ed. Paris 1517, repr. Bologna 1967, fo.396va): [...] *et adiecit glosa quod ita continebatur in legem xii. tabularum quod post xl. dies daretur creditoribus lacerandus et duriciam illius legis defendit celcus cecilius quod [lege: contra] quemlibet philosophum. hoc simplex acquiesceret isti glose. Et hoc est falsissimum, unde non est aliqua lex quod tradatur creditoribus lacerandus quod fuerit in legem xii. tabularum et celcus cecilius hoc dixerat.*

<sup>35</sup> See below note 40.

the creditor. It said it *solely* prevented their incarceration: *In eo tantum hoc beneficium eis prodest ne iudicati detrahantur in carcerem*<sup>36</sup>.

The glosses to this text discussed whether this is true. From several other texts in the Corpus iuris it is derived that debtors after they had ceded all their goods could no longer be sued for more than they could pay. Hence, also to this effect a *cessio bonorum* was of some use<sup>37</sup>. The Ordinary Gloss reports another effect not mentioned in C.7.71.1. The XII Tables contained a provision that after 40 days the debtor was turned over to his creditors to be lacerated. A *cessio bonorum* averted this as well<sup>38</sup>. In this respect Accursius diverged from the teachings of Azo. Several manuscripts contain a gloss of Azo, which explains that *in eo tantum prodest* in C.7.71.1 meant that a *cessio bonorum* averted the debtor's imprisonment but not his being handed over to his creditors<sup>39</sup>. In his lectures, Azo expressed the same view. Here, Azo read in Aulus Gellius' account of the discussion between Sextus Caecilius and Favorinus, that the jurist had taken the view that Roman law had never allowed creditors to lacerate insolvent debtors, while the philosopher had said that debtors were personally bound and hence were to be turned over to their creditors should they fail to pay their debts. In this line of thought the words '*in eo tantum*' in C.7.71.1 expressed that the *cessio bonorum* prevented the debtor's incarceration, but not his being turned over to his creditors to be lacerated<sup>40</sup>.

<sup>36</sup> C.7.71.1 *Imp. Alexander A. Irenaeo Qui bonis cesserint, nisi solidum creditor receperit, non sint liberati. In eo tantum hoc beneficium eis prodest ne iudicati detrahantur in carcerem.* [223]

<sup>37</sup> Cf. Inst.4.6.40, D.42.3.4, D.42.3.6 and C.7.72.3. Cf the gloss *In eo tantum* ad C.7.71.1 in Ms. Paris BN 4536, fo.168vb: *Hoc tantum non excludit aliud beneficium quod habent ne condemnentur nisi in quantum facere possunt*; AZO, *Lectura super C.7.71.1* (below, note 40); ACCURSIUS, gloss *In eo tantum* ad C.7.71.1 and ODOFREDUS, ad C.7.71.1. s.v. *Non liberati*.

<sup>38</sup> Cf. ACCURSIUS, gloss *In eo tantum* ad C.7.71.1 (above, note 33)

<sup>39</sup> Cf. gloss *In eo tantum* ad C.7.71.1 in Ms. Bamberg 21, fo.166rb & Paris BN 4534, fo.164vb: *Hoc tantum [non] excludit aliud beneficium quod habent, scilicet ne condemnentur [nisi] in quantum facere possunt, sed [excludit] quod supra dixerat, ut post xl. dies dilationem detrahantur creditoribus. ut refert A(ulus) ge(l)lius contineri in legem xii. tabularum; eius duritiam Sextus Cecilius contra quemdam philosophum defendit. Az.*

<sup>40</sup> Cf. AZO, *Lectura super C.7.71.1* s.v. *In eo tantum* (ed. Paris 1527; repr. Turin, p.609): *Hoc 'tantum' non excludit aliud beneficium quod habent, scilicet ne*



References to execution of judgement on the person recur in the commentaries to the last constitution of this title: C.7.71.8. From this constitution of Justinian it is derived that an insolvent debtor could also be granted a suspension of payment. Justinian was requested, the text of the constitution states, to come to the help of debtors who had to take recourse to the infamous *cessio bonorum*, and allow their creditors to choose between accepting the latter or allowing a moratorium of five years<sup>41</sup>. Azo assumed that this constitution only applied in case a debtor decided to offer his creditors a choice between the two<sup>42</sup>. In other words: the creditors could not frustrate the debtor's right to a *cessio bonorum* by allowing a suspension of payment instead. Accursius, however, interpreted from the constitution that the Emperor granted the creditors the choice between the two<sup>43</sup>.

In this matter, the printed editions of the Ordinary Gloss are contradictory since they also contain the gloss *Electio detur*, which explains '*a debitor*': the choice is given by the debtor. Cinus da Pistoia († 1336) ascribed this gloss to Accursius' son Franciscus<sup>44</sup>. In his time, Cinus wrote his *lectura* around 1313, he said the view of Franciscus Accursius prevailed among the Bolognese professors<sup>45</sup>. The debtor could instead of ceding his goods, offer his creditors the

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*condemnentur nisi in quantum facere possunt. ut infra tit. i. l. Ex contractu (C.7.72.3), sed excludit quo ad alia: quia antiquitus in legem xii. tabularum dixit Sextus Caecilius non dilacerari corpus debitoris, quidam tamen philosophus ex subtilitate sua dixit in carcerem detrudi et post xl. dies debet tradi debitor creditoribus cum non possit insolidum satisfacere; persona enim obligabatur, et ideo poterat dilacerari. et quo ad illa excludit.*

<sup>41</sup> C.7.71.8pr: *Cum solito more a nostra maiestate petitur ut ad miserabilis cessionis bonorum homines veniant auxilium et electio detur creditoribus uel quinquennale spatium eis indulgere vel bonorum accipere cessionem [...].*

<sup>42</sup> Cf. AZO, summa C.7.71 (ed. Pavia 1506, repr. Turin 1966, p.292): *Quid autem si debitor dicat creditoribus cedam bonis uel date mihi dilationem quinquennii.*

<sup>43</sup> Cf. ACCURSIUS, gloss *Inducias*, ad C.7.71.8pr: *Et sic est in creditoribus electione. [...];* ODOFREDUS, ad C.7.71.8pr. (ed. Lyon 1552, repr. Bologna 1967, fo.135v): *Or ponamus quod si aliquis impetrat a principe quod liceat cedere bonis, datur electio creditoribus vel accipere bonorum cessione, uel quinquennale spatium debitoribus indulgere.*

<sup>44</sup> Cf. CINUS, ad C.7.71.8pr (ed. Frankfurt 1578, repr. Turin 1964, fo.477va): *[...] Vnde exponat hic Franc. Ac. electio detur, scilicet per ipsum debitorem;* See also BARTOLUS, ad C.7.71.8pr.

<sup>45</sup> Cf. CINUS ad C.7.71.8pr (ed. fo.477va): *Et propterea intelligunt moderni doctores quod hoc sit in potestate debitoris;* Cf. also Bartolus, ad C.7.71.8.

choice between a *cessio bonorum* and a moratorium. By so doing, however, if the creditors choose to grant a suspension of payment, the debtor thereby forfeited his right to a *cessio bonorum*. If, after five years, his debts had not been paid, the debtor could no longer cede his goods. He was to be incarcerated, as the Ordinary Gloss said, and detained for 40 days, since someone might out of pity to pay his debts, and afterwards turned over to his creditors to be lacerated<sup>46</sup>.

##### 5. The Notion of Incarceration

As earlier said, the glossators derived from C.7.71.1 that imprisonment awaited those judgment debtors who would not or – or after a suspension or payment – could not cede their goods. *In eo tantum hoc beneficium eis prodest ne iudicati detrahantur in carcerem*. Azo and Accursius derived from Aulus Gellius that the XII Tables had restricted its duration to 40 days. Pending execution on his person, some time was provided for in case someone might solve the debtor's debt out of pity, as Accursius said<sup>47</sup>.

Odofredus de Denariis († 1265) took a different view. In his lecture on C.7.71.1 he asserted that insolvent debtors stayed in prison until they had repaid their debts: *et ibi detineantur quousque solverint*<sup>48</sup>. Azo and Accursius derived from Aulus Gellius that a period of detention preceded execution on the person. Odofredus, however, seems to consider them to be alternative modes of execution: impecunious judgement debtors, who fail to cede their goods, are either incarcerated until their debts are paid in full, or turned over to their creditors to be lacerated<sup>49</sup>. In Bologna, Odofredus reported that statutory law denied insolvent debtors the right to cede their goods; they were all incarcerated in one prison<sup>50</sup>. The latter refers

<sup>46</sup> Cf. ACCURSIUS, gloss *Generando* ad C.7.71.8.7: [...] *Item si quinennio transacto uelit debitor cedere bonis an audiatur? Resp. non, sed erit incarcerandus [...] et sic usque ad xl. dies stare debet ut saltem misiricordie causa aliquis soluat pro eo; post modum creditoribus dilacerandus datur. ut dixi supra eod. l.i.* (ad C.7.71.1).

<sup>47</sup> See above, note 46.

<sup>48</sup> ODOFREDUS, ad C.7.71.6 s.v. *in carcerem* (ed. Lyon 1552, repr. Bologna 1967, fo.135v).

<sup>49</sup> Cf. his *Lectura* ad C.7.71.1 (*ibidem* fo.135r): *In quo ergo prodest haec cessio? Quod non traditur debitor creditoribus lacerandus vel ut non tradatur in carcerem ut hic et ff. eod. His qui (D.42.3.4).*

<sup>50</sup> Cf. ODOFREDUS, *Lectura* ad C.7.71.1 no.1 (*ibidem* fo.135rb): ... *Tamen istud edictum quod bonis cedere possunt, non habet locum in civitate ista, quia hic est lex*

to the Malpaghe prison which was completed around 1260. In many north-Italian cities the *statutae* ruled that upon request of their creditors judgement debtors were banned from the city, if they failed to obey a court order<sup>51</sup>. Examples of such statutory provisions date back to 1184 (Como), 1203 (Verona) and 1216 (Milan and Padua)<sup>52</sup>. In Bologna these *banni pro debiti capti* were detained in the Malpaghe prison, separately from the *latrones communes*<sup>53</sup>.

C.7.71.1 is silent on the question where impecunious debtors who did not cede their goods were to be incarcerated. Was a public prison meant, or could they be detained in their creditor's home? Having a private carcer constituted the crime of *laese-majesty* according to a constitution of Emperor Zeno (C.9.5.1). One could therefore question whether it would be in accordance with the law to deal with a debtor as Aulus Gellius had described, by the creditor transporting him home while he is fastened with chains or foot irons of at least 15 pounds to prevent his flight. Azo and Accursius did not discuss the question – perhaps no conflict was felt. Some glossators, Revigny reported, derived from C.7.71.1 the validity of clauses in contracts concluded with scribes, which allowed their creditors in case of non-performance to imprison them until they had finished the promised copying of lawbooks<sup>54</sup>. In medieval manuscripts scribes refer occasionally to such enforced performance, e.g. already in a tenth-century

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*municipale iurata, quod si aliquis non potest solvere, est unus carcer in quo detruduntur omnes non solventes.*

<sup>51</sup> This was also reported by Accursius. Cf. his gloss *In carcerem* ad C.7.71.1: ... *Sed loco carceris hodie ponitur in banno*. Jacobus Butrigarius rightfully corrects the gloss, because banishment did not take its place. Those who were banned could subsequently be incarcerated if they returned to the city. Cf. JACOBUS BUTRIGARIUS, ad C.7.71.1 (ed. Paris 1516, repr. Bologna 1973, fo.60v): *Verum glosa dicit quod bannum succedit loco carceris, quod non est uerum, quia bannum est preparatorium carceris, quia primo bannitur, postea potest carcerari.*

<sup>52</sup> Cf. PLANITZ (*supra* n.11), *passim*.

<sup>53</sup> Cf. G.GELTNER, *The medieval prison. A social history*, Princetown 2008, pp.21-27.

<sup>54</sup> Cf. JACQUES DE RÉVIGNY, *Lectura super C.7.71.1* (ed. Paris 1517, repr. Bologna 1967, fo.396va): *Arg. huius legis dicunt doctores quod si conuenio cum scriptore quod nisi scribat deducam eum in carcerem, valet ista conuentio, quia quod potest fieri per legem et per conuentionem*. On enforced performance by scribes and the learned law see F.P.W.SOETERMEER, *La carcerazione del copista*, RIDC 6 (1995), pp.153-189; J.H.DONDORP, *Civil custody as coercive measure in medieval law*, in: *Law and private life in the middle ages [Proceedings of the 6th Carlsberg Academy conference on medieval legal history]*, pp.165-180 at 174ff.

manuscript: “I have copied a part of this work, not out of free will but coerced by the laying of foot irons<sup>55</sup>”.

Revigny did not condone this practice. He maintained that a scribe who no longer wished to keep his contract, could not avert specific enforcement through a cession of all his goods, *viz.* his quill and ink. In case of money-debts, if a debtor cedes all his goods, the proceeds of his possessions may satisfy the creditor. However, this cannot be true in obligations to do something, such as that of a scribe, which one must perform in person. His goods cannot write, and the proceeds thereof cannot be used to pay a substitute. Hence, a scribe is bound to specific performance to such extent that he is put in foot irons in case of non-performance: *ita quod ponatur in compedibus*<sup>56</sup>.

The notion of foot irons as a coercive measure does not derive from the texts of the *Corpus iuris*, which only once refers to a shackled person, *viz.* a slave<sup>57</sup>. Some glossators, Revigny said, did not allow specific enforcement and restricted the modes of coercion to court fines but he himself considered this customary mode of coercion to be in accordance with Roman law<sup>58</sup>. In this respect Revigny followed the view of Odofredus, whose pupil Pietro Peregroni may have introduced his opinion in Orleans.

#### 6. The Commentators

With Jacques de Révigny the emphasis in the commentaries on C.7.71.1 shifted to the latter question, *viz.* whether scribes may be detained to enforce specific performance. As said above, in his opinion it did not derive from Aulus Gellius’ report of the XII Tables that the judgment-debtor was handed over to his creditors to be lacerated. Revigny was mistaken, for this was precisely what Aulus Gellius had reported, but nevertheless his view soon prevailed. Cinus

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<sup>55</sup> *Quandam partem huius libri non spontanea uoluntate sed coactus compedibus constrictis scripsi, sicut oportet uagum atque fugituum uincire*; quoted from W.WATTENBACH, *Das Schriftwesen im Mittelalter*, Leipzig 1886 repr. Graz 1948, p.440; for other examples see H.E. BRAUN, *Von der Handschrift zum gedruckten Buch*, in: *Buchkultur im Mittelalter, Buch – Bild – Kommunikation*, Berlin-New York 2005, p.223.

<sup>56</sup> REVIGNY, ad C.7.71.1 (ed. fo.369vb).

<sup>57</sup> Cf. O.GRADEWITZ e.a. (eds.), *Vocabularium iurisprudentiae romanae*, I, Berlin 1903, col.838.

<sup>58</sup> Cf. REVIGNY, ad D.39.1.21.4 (ed. SOETERMEER, *supra* n.54, p.178).

da Pistoia simply stated there was no law, from which derived that judgement debtors were handed over to their creditors to be lacerated<sup>59</sup>. Bartolus de Saxoferrato (1314-1357) no longer discussed the matter. Perhaps Baldus d'Ubaldis (1323-1400) while restating the Ordinary Gloss, gave the best summary of what Aulus Gellius had written:

*Inter alia dicit (glosa) quod olim erat quoddam statutum quod post quadraginta dies debitor dabatur creditoribus cruciandus, quod tamen statutum tamquam durum fuit correctum*<sup>60</sup>.

### 7. Conclusion

It derives from C.7.71.1 that debtors who fail to comply with the court's sentence, can be imprisoned unless they cede all their goods. Nowhere the Corpus iuris authorized their disfigurement or death. Nevertheless, the Ordinary Gloss derived from a literary source, Aulus Gellius' *Noctes Atticae* that the XII Tables may have contained such provision: it allowed the creditors, the gloss states, to lacerate their debtor after 40 days of imprisonment.

It was, however, already among the glossators highly contested whether this was true. Azo had argued that according to Aulus Gellius' account of the discussion between Africanus and Favorinus, it was the philosopher Favorinus who had taken this view. The jurist, Africanus, had denied that this could be found in the XII Tables. In Orleans, Jacques de Revigny took the same stand. Hence, in their view it would be in accordance with Roman law (C.7.71.1) to detain a debtor who would not or could not cede all his goods; but his creditors could not injure or kill him with impunity.

This was also the view of the commentators who argued there was no provision in the Corpus iuris which authorized creditors to cut the debtor in pieces. Such notion could perhaps be found in the old Roman law, as Baldus maintained but had since long been corrected. In Renaissance times even Aulus Gellius' reading of XII Tables 3.6

<sup>59</sup> Cf. CINUS ad C.7.71.1 nr. 9 (ed. fo.477ra): ... *sed ex qua lege dextraxerit praedicta verba nescio, quia non reperitur aliqua lege quae dixerit nisi quod in carcerem tantum detrubatur*; ad C.7.71.8pr (ed. fo.477va): *Dico, ponetur in carcerem, non tamen post tempora dabitur creditoribus lacerandus, quia in hoc nulla lege reperitur. ut dixi supra. l.i. (ad C.7.71.1)*.

<sup>60</sup> BALDUS D'UBALDIS, ad C.7.71.1. nr.3 (ed. fo.117va).

became disputed. Among the interpretations offered, one already finds the view nowadays defended by Dieter Flach (and adopted by Kaser/Hackl) that not a division of the debtor's body is meant, but of the proceeds of his sale *trans Tiberim*.